Supreme Court, U.S.
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No.

In The

Supreme Court of the United States
October Term, 2007

Joseph V. Nash,

Petitioner,

vs.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit erred in denying a certificate of appealability as to the denial of Petitioner's Motion under 28 U.S.C. §2255 by the district court which did find ineffective assistance of counsel, but nevertheless found no prejudice in:

(a) Petitioner's counsel's failure to object to the trial court's ruling that it, rather than the jury, determined the materiality element in 18 U.S.C. §1344 offenses, thereby precluding appellate review under Fed.R.Crim.P. 52(a);

(b) Petitioner's counsel's failure to object or move to dismiss an indictment when the district court violated the Speedy Trial Act by erroneously excluding time based on a vacation planned by second chair government counsel and its own busy court calendar. [1]

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1. The §2255 Motion pled four grounds of ineffective assistance of counsel, but only two are the subject of this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Joseph V. Nash respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case and requests a remand with direction to issue a certificate of appealability.

OPINION BELOW

The opinion of the Court of Appeals is not reported. App. 1a.

JURISDICTION

The Order denying Petitioner's request for a certificate of appealability was filed on June 29, 2007. App.1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

> or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutory Provisions

Title 28 U.S.C.§2255 during the relevant time period provided in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Title 28 U.S.C.§2253(c)(2) during the relevant time

period provided in pertinent part:

> A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

Title 18 U.S.C.§3161 during the relevant time period provided in pertinent part:

> (c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

Title 18 U.S.C.§3162 during the relevant time period provided in pertinent part:

> (2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h) (3). In

> determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

Title 18 U.S.C.§1344 during the relevant time period provided in pertinent part:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice -
>
> (1) to defraud a federally chartered or insured financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

A. Procedural History

Petitioner Joseph V. Nash was charged in a 15 count indictment for false statements and representations in connection with four loans from four banks. On July 9, 1991, a 10 count indictment was filed, charging violations of 18 U.S.C.§§1014 and 1344 regarding two bank loans. Count One charged a violation of §1344 regarding a loan from one bank, and Counts Two, Three and Four charged violations of §1014 for the same loan. Counts Five through Eight charged violations of §1344 regarding a loan from another bank, and Counts Nine and Ten charged violations of §1014 regarding the same loan. On July 11, 1991, petitioner appeared in this matter and was arrested in connection with this indictment.

On October 8, 1991, a superseding indictment was filed, charging nine of the same counts as in the original indictment; only Count Four in the original indictment did not appear in the superseding indictment. Counts Seven, Eight and Nine in the superseding indictment are identical to Counts One, Two and Four in the original indictment. Counts Ten through Thirteen in the superseding indictment are identical to Counts Five through Eight in the original indictment. Finally, Counts Fourteen and Fifteen in the superseding indictment are identical to Counts Nine and Ten in the original indictment. Thus, Counts Seven through Fifteen in the superseding indictment were originally charged in the indictment filed on July 9, 1991, and the Speedy Trial Clock started then as to those counts.

The only changes in the superseding indictment from the original indictment were the deletion of one original count and the addition of Counts One through Six, which added violations

of §1014 regarding the two loans. Counts One through Four charged violations of 18 U.S.C. §1014 regarding two draft tax returns submitted in a loan application to Liberty National Bank. Counts Five and Six charged violations of §1014 for the same two returns submitted in a loan application to First Pacific Bank. Count Seven charged a violation of 18 U.S.C. §1344 for a scheme to defraud by means of false representations made to obtain two loan extensions from Union Bank. Counts Eight and Nine charged violations of §1014 for the same representations already charged in Count Seven. Counts Ten through Thirteen charged a scheme to defraud in violation of §1344 in a loan application to Great Western Bank (ultimately found by the Court of Appeals to be multiplicitous). Counts 14 and 15 charged separate violations of §1014 for the same false statements to Great Western already charged in Counts 10 through 13.

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on all counts and was sentenced in April 1992 to a term of imprisonment of 11 years, which he served. [2] The trial court instructed the jury, without defense objection, that "'[f]alse statements of income and assets are material for the purposes of *these instructions*.' Jury Instruction 40." (emphasis added) *United States v. Nash,* 115 F.3d 1431, 1436 (9th Cir.1997).

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2. Petitioner was sentenced on Counts 1 through 6 to 27 months; followed by 2 years on Counts 7, 8, and 9; followed by 5 years on Counts 10 through 13 ; followed by 2 years on Counts 14 and 15; for a total of 11 years of incarceration, all followed by a combination of 5 and 3 years of supervision. At resentencing on remand, the district court added four additional months for reasons never stated, all of which Petitioner served.

In an opinion filed August 16, 1996, the Ninth Circuit reversed 10 counts of the 15 counts of conviction, based on this Court's decision in *United States v. Gaudin*, 515 U.S. 506 (1995). *United States v. Nash*, 64 F.3d 504 (9th Cir. 1995) (*Nash I*). Nash successfully petitioned for rehearing, seeking reversal of the five affirmed counts. *United States v. Nash*, 72 F.3d 780 (9th Cir.1996) (granting petition for rehearing and withdrawing *Nash I*); *United States v. Nash*, 76 F.3d 282 (9th Cir.1996) (*Nash II*) (reversing all 15 counts of conviction).

Following this Court's opinions in *United States v. Wells*, 519 U.S. 482 (1997) and *Johnson v. United States*, 520 U.S. 461 (1997), the Ninth Circuit withdrew *Nash II* and affirmed all counts of conviction (with the exception of a remand to vacate three of the four multiplicitous counts of §1344 charged in Counts 10 through 13). *United States v. Nash*, 115 F.3d 1431 (9th Cir.1997) (*Nash III*).

The Ninth Circuit remanded Counts 10 through 13 for resentencing, finding that they were multiplicitous. Nash, 115 F.3d at 1438, 1442. Resentencing was held in the district court on August 31, 1998, reimposing the same 11-year sentence. Nash appealed that sentence, and on July 7, 2000, the Ninth Circuit again remanded for the limited purpose of vacating three of the four multiplicitous counts. *United States v. Nash*, 229 F.3d 1160 (9th Cir.2000). On November 6, 2000, the court vacated Counts 11, 12 and 13 (18 U.S.C. § 1344). After the 10-day period for appeal had expired, the district court issued a Judgment and Commitment Order which mysteriously added four months to the sentence which had been capped by the Court of Appeals at 11 years, even though it had stated in open court that the sentence remained the same. No appeal was taken by either party, and Petitioner served the entire sentence. *See*, n.4, *supra*.

Previously on January 21, 1999, petitioner filed a motion under 28 U.S.C. §2255. On February 2, 1999, the government successfully moved to stay briefing and resolution of this motion pending petitioner's appeal of the resentencing of August 31, 1998. App. 3a-4a.

Following the resolution of the appeal, Petitioner filed an amended Motion under 28 U.S.C. §2255 on October 24, 2001. The government filed its response on May 10, 2002 and Petitioner filed his traverse on August 29, 2002.

The matter then stood submitted without decision for four years. On August 24, 2006, the district court (now the third court on the Motion) filed its Order Denying the Motion in its entirety. App 2a-11a. On October 10, 2006, Petitioner filed a timely notice of appeal with a request for a certification of appealability. On June 29, 2007, the Court of Appeals denied his request for a certificate of appealability without comment. App 1a.

This Petition concerns the refusal of the Ninth Circuit Court of Appeals, in clear contravention of the rule established by this Court, to issue a certificate of appealability for two issues unsuccessfully raised by Petitioner in the district court on his §2255 Motion, even though the appellate court recognized and conceded that at least one issue involved open and debatable questions of law. Petitioner seeks an order remanding this matter to the appellate court and directing it to issue a certificate of appealability."

B. Opinion of the Court of Appeals

The decision of the Court of Appeals of which review is sought is its denial without explanation of Petitioner's request

for a certificate of appealability from the denial of his Motion under 28 U.S.C. §2255. App. 1a

REASONS FOR GRANTING THE PETITION

I
THE APPELLATE COURT'S DENIAL CONFLICTS WITH ITS HOLDING IN *ALFERHANIN* THAT *OLANO* LEFT OPEN WHETHER AN INSTRUCTIONAL ERROR ON MATERIALITY CAN AFFECT SUBSTANTIAL RIGHTS UNDER PLAIN ERROR ANALYSIS WITHOUT ACTUALLY PREJUDICING THE DEFENDANT AND THUS PETITIONER IS ENTITLED TO A CERTIFICATE OF APPEALABILITY ON THIS OPEN ISSUE

The district court accepted the Ninth Circuit's findings (1) that Petitioner's counsel failed to object to the trial court's erroneous determination of materiality in the §1344 Counts (Counts 10-15); (2) that "the error was plain at the time of appellate consideration"; and (3) "that it affects substantial rights."*Nash,* 115 F.3d 1437. But the Ninth Circuit held that "Nash could not meet the fourth prong of the plain error analysis–that the error seriously affected the fairness, integrity or reputation of the proceedings." *Id.*

However, in its Order, the district court essentially dismissed any difference between plain error review under 52(b), required by counsel's failure to object, and harmless error review under 52(a). The district court found that "Rules 52(a) and 52(b) both address whether an error committed during trial affected 'substantial rights..' " App. 11a.

The district court neglected to note that the Ninth Circuit

had already found the trial court's error "affect[ed] substantial rights." *Nash,* 115 F.3d 1437. The district court stated that the result of the Ninth Circuit's review of the instructional error would have been *the same* whether reviewed under 52(a) or (b). App.11a-12a.

Neither the district court nor the Ninth Circuit accorded its decision in *United States v. Alferahin*, 433 F.3d 1148. (9th Cir.2006), filed the prior January. In *Alferahin*, the Court held that the omission of the an instruction on the element of materiality in false statement cases prejudiced the defendant and reversed. *Id.*, at 1162. It found it unnecessary to address "the question of whether an error can 'affect' a defendant's substantial rights for purposes of plain error analysis without actually prejudicing the defendant." *Id.*, at n.4. However, it noted that

> That question appears to be an open one, as both the Supreme Court and the Ninth Circuit have dodged it. *See Olano,* 507 U.S. at 735, 113 S.Ct. 1770("We need not decide whether the phrase 'affecting substantial rights' is always synonymous with 'prejudicial.' "); *Perez,* 116 F.3d at 847("[W]e need not make the difficult determination of ... 'whether the phrase "affecting substantial rights" is always synonymous with "prejudicial" ' (quoting *Olano,* 507 U.S. at 735, 113 S.Ct. 1770)).

Alferahin, 433 F.3d at 1162 n.4. (9th Cir.2006).

In order to obtain a certificate of appealability----

> A petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a certificate

> of appealability. 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). 'The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.' *Slack*, 529 U.S. at 484, 120 S.Ct. 1595; *see also Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). To meet this 'threshold inquiry,' *Slack*, 529 U.S. at 482, 120 S.Ct. 1595, the petitioner " 'must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.' " *Lambright*, 220 F.3d at 1025 (alteration and emphasis in original) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (internal quotation marks omitted)).

Id., at 951.

Thus, the Ninth Circuit's denial of a certificate of appealability on this issue stands in sharp contrast to its holding that the question presented represents an "open" one. *Alferahin*, 433 F.3d. 1161, n.4. If the question is "open," then at this stage, "reasonable jurists would find the district court's assessment of the constitutional claims debatable," and a certificate of appealability should be granted on this issue. *Slack*, 529 U.S. at 484, 120 S.Ct. 1595.

Thus, the matter should be remanded on this issue in order for the Ninth Circuit to address the very issue it determined was left open by *Olano*–whether an error can affect a defendant's substantial rights for purposes of plain error

analysis without actually prejudicing the defendant.

II

REVIEW IS NECESSARY TO RESOLVE WHETHER A HABEAS COURT CAN FIND THAT THE SPEEDY TRIAL ACT WAS VIOLATED AND THAT THE TIME-BARRED CHARGES BE DISMISSED, BUT ALSO FIND THAT THE TRIAL JUDGE WOULD NEVERTHELESS HAVE DISMISSED THEM WITHOUT PREJUDICE AND THAT PETITIONER THEREFORE SUFFERED NO PREJUDICE

The district court found that Nash's Speedy Trial Act and Sixth Amendment rights had indeed been violated when the trial court excluded time for its "busy court calendar" and for the "prosecutor's vacation." It also found that Petitioner's counsel made no objection or motion to dismiss the time-barred counts. App. 6a. The court did not dispute Nash's claim that counsel's failure constituted ineffective assistance. *United States v. Palomba,* 31 F.3d 1456, 1461 (9th Cir.1994) (failure to move for dismissal of counts barred by Speedy Trial Act is ineffective assistance of counsel).

The district court stated that "Nash was originally indicted on July 9, 1991," and "[o]n October 8, 1991, a grand jury returned a fifteen count superseding indictment..." App 2a.. The district court's Order appeared erroneously to assume that the entire case ("If the case had been dismissed...") was the subject of Nash's Speedy Trial claim. App.7a.

In fact, Nash's §2255 claim is that only the Counts

charged in the original indictment were subject to the undisputed Speedy Trial Act violation, not the "entire case." App.7a.. In the superseding indictment which went to trial in violation of the Speedy Trial Action, Counts Seven through Fifteen were subject to dismissal. These counts constituted 9 of the 11 year total sentence. *See,* n.2, *supra.*

The district court found that the Government did "not address whether the 84 days were properly excluded." App.6a.. In short, the Government did not dispute that the 84 days were improperly excluded. The court found that Petitioner's counsel failed to object to that violation which allowed "the trial to commence 69 days after required by the Speedy Trial Act." *Id.* The district court did not mention that Petitioner's counsel represented to the trial court that he did not ask to continue either a motion hearing date set for November 25, 1991, or the trial date set for December 9, 1991.

The district court then reviewed the options available to the trial court under 18 U.S.C. §3162(a)(2): "the trial court could have dismissed the case with or without prejudice." App.7a. The district court then stated that "[i]f the court had dismissed the case with prejudice, Nash can show resulting prejudice from the underlying Sixth Amendment violation." App. 7a.

The district court then went on a flight of inspiration, unsupported by the record, and erroneously concluded:

> If the case had been dismissed without prejudice, however, the Government almost assuredly would have reindicted Nash, and Nash makes no showing that the new trial would have turned out differently.

Id.

The district court recognized its duty to "consider whether the defendant was prejudiced by the delay. *United States v. Taylor*, 487 U.S. 326, 334 (1984)." However, it failed to consider the prejudicial effects of a dismissal without prejudice outlined in *Taylor:*

> Dismissal without prejudice is not a toothless sanction: it forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds. Given the burdens borne by the prosecution and the effect of delay on the Government's ability to meet those burdens, substantial delay well may make reprosecution, even if permitted, unlikely.

Id., at 342.

The District court made no such analysis and failed to consider a host of alternatives, which would have formed the basis for prejudice. It rejected, without any basis in the record, that the trial court would have dismissed with prejudice. It never considered whether any of the dismissible charges would have been barred by the statute of limitations, such that they could not have been reindicted. The district court never considered whether the reindictment would have had to be presented to a fresh grand jury, since the original grand jury's term had ended. The Order did not consider whether the additional time to secure a new indictment and set a new trial date would have led to new defense counsel.

It is also possible that the Government may not have reindicted Nash as to Counts 7 through 15, which admittedly should have been dismissed by the trial court, had defense

counsel objected, and thereby streamlined the trial to Counts 1 through 6, which were not time barred.

In short, the district court selected the most severe alternative without any support in the record and neglected to consider any prejudice to the petitioner required in *Taylor*.

Conclusion

For these reasons, the Petition for Writ of Certiorari should be granted and the matter remanded to the Court of Appeals for the Ninth Circuit to issue a certificate of appealability as to either or both of the issues presented here.

Respectfully submitted,

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September 24, 2007

APPENDIX

1. Order of the Court of Appeals for the Ninth Circuit denying Request for Certificate of Appealability, filed June 29, 2007.

2. Order of the District Court for the Central District of California denying Motion Under 28 U.S.C. Section 2255, filed August 24, 2006. (pages 1-9, 19,pertinent to the two issues presented here).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 06-56460
	)	
Plaintiff-Appellee,	)	DC. Nos.
	)	CV-99-00557-DT
v.	)	CR 91-0609-LEW
	)	
JOSEPH V. NASH,	)	
	)	ORDER
Defendant-Appellant.	)	
	)	

Filed June 29, 2007; Cathy A. Catterson, Clerk
U. S. COURT OF APPEALS

Before: RYMER and GRABER, Circuit Judge

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2)

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

[ENTERED CLERK, US DISTRICT COURT AUG 2 5 2006]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES, Respondent, v. JOSEPH V. NASH, Petitioner.	CASE NO. CV 99-0557 DT CASE NO. CR 91-0609 LEW ORDER DENYING PETITIONER JOSEPH V. NASH'S MOTION TO VACATE, SET ASIDE OR CORRECT HIS SENTENCE PURSUANT TO 28 UNITED STATES CODE SECTION 2255

I. Background

Petitioner Joseph V. Nash moves to vacate, set aside, or correct his sentence pursuant to 28 United States Code section 2255, alleging ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. This motion is denied.

A. Factual Summary

Nash was originally indicted on July 9, 1991. On October 8, 1991, a grand jury returned a fifteen-count superceding indictment charging Nash with Eve counts of bank fraud in violation of 18 United States Code section 1344 and ten counts of making false statements to a federally-insured lending institution in violation of 18 United States Code section 1014. Nash's trial began on December 10, 1991. On

January 21, 1992, a jury convicted Nash of all fifteen counts. District Judge Laughlin E. Waters sentenced Nash to eleven years imprisonment, to be followed by five years of supervised release. Judge Waters also imposed a special assessment of $750 and ordered restitution.

On appeal, the Ninth Circuit vacated and remanded Nash's sentence as to counts 10-13 (finding them to be multiplicitous), but otherwise affirmed. See United States v. Nash, 115 F.3d 1431 (9th Cir. 1997), cert. denied 522 U.S. 1117 (1998). On remand, Judge Waters sentenced Nash to eleven years and three months imprisonment (five years on Counts 10-13 to run concurrently to each other, but to run consecutive to the six years and three months imposed on Counts 1-7) and imposed a $600 special assessment. Nash again appealed, and also filed this motion under 28 United States Code section 2255. Judge Waters stayed the section 2255 motion pending Nash's appeal to the Ninth Circuit.

On appeal, the Ninth Circuit again remanded to allow the district court to vacate three of the four multiplicitous counts, but otherwise affirmed. See United States v Nash, 229 F.3d 1160 (9th Cir. 2000). On November 6, 2000, the district court vacated counts 11-13. The stay on this motion was then lifted.

Petitioner's motion is based upon four separate instances of alleged ineffective assistance of counsel. The facts underlying each specific allegation are found within the relevant sections of the Court's analysis, *infra.*

B. Procedural Summary

On January 21, 1999, Petitioner filed the present Motion Pursuant to 28 United States Code 2255 to Vacate, Set Aside or Amend his Sentence, in the United States District Court for the Central District of California, which was assigned to Judge Laughlin E. Waters.

On March 17, 1999, the Court ordered that Petitioner's

Motion be stayed until his pending appeal in his criminal case was resolved.

On October 24, 2001, following the resolution of that appeal, Petitioner filed

[Page 2 of original document]

an Amended Motion Pursuant to 28 United States Code 2255 to Vacate, Set Aside or Amend his Sentence. On May 10, 2002, Respondent filed a Memorandum in Opposition to Petitioner's Amended Motion. On August 29, 2002, Petitioner filed a Traverse to Respondent's Memorandum in Opposition.

On June 5, 2002, this matter was reassigned from Judge Waters to Judge William Matthew Byrne, Jr.

On August 19, 2005, the Court ordered the parties to provide a status report concerning this matter. On September 8, 2005, Petitioner filed his Status Report. On September 16, 2005, Respondent filed its Response to Petitioner's Status Report. On October 12, 2005, Petitioner filed a Reply to the Respondent's Response.

On January 24, 2006, this matter was reassigned from Judge Byrne to Judge Dickran Tevrizian.

On March 15, 2006, the Court issued a Minute Order taking this motion under submission.

On May 11, 2006, the Court ordered supplemental briefing on Ground 3 of Petitioner's Motion. On May 26, 2006, Petitioner filed his Supplemental Brief. On June 30, 2006, Respondent filed its Opposition to Petitioner's Supplemental Brief. On July 11, 2006, Petitioner filed his Reply to the Opposition.

II. Discussion

A. Standard

"The [Supreme] Court has recognized that 'the [Sixth

Amendment] right to counsel is the right to the effective assistance of counsel.'" Strickland v. Washington, 466 U.S. 668, 686 (1984) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."

[Page 3 of original document]

Strickland, 466 U.S. at 686.

In order to succeed on a claim of ineffective assistance of counsel, the defendant must show (1) that his counsel's representation was "deficient" in other words, that it "fell below an objective standard of reasonableness," and (2) that prejudice resulted, meaning "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 686, 688, 694.

B. Analysis

Nash argues that there are four mutually exclusive bases for finding that there was ineffective assistance of counsel by his trial counsel, James A. Twitty. He argues that Twitty was ineffective in: (1) failing to move to dismiss the case under the Speedy Trial Act; (2) failing to object to the trial judge's allegedly improper instruction to the jury on materiality; (3) failing to disclose to the Government the existence of Nash's expert and failing to inform the court accurately regarding the substance of the expert's proposed testimony; and (4) failing to object to, or request a curative instruction, regarding the Government's purportedly improper cross-examination of Nash.

The Government argues that Twitty's representation did

not fall below an objective standard of reasonableness, citing Twitty's declaration as its main evidentiary support.[1] The Government also argues that, even if Twitty's

[Page 4 of original document]

representation was deficient, it did not result in prejudice.[2]

1. Speedy Trial Act

18 United States Code section 3161(c)(1) states that "the trial of a defendant ... shall commence within seventy days from the filing date (and making public) of the information or indictment." 152 days elapsed between the filing of the original indictment and the beginning of Nash's trial. Nash concedes that the trial court properly excluded thirteen of those days (for the filing of various motions). However, Nash challenges the trial court's exclusion of 84 more days, alleging that the reasons

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1. Part of Petitioner's motion is factually driven by Nash's contentions concerning trial strategy on one side and Twitty's contentions on the other. Nash calls into question Twitty's credibility, given the fact that in 1996 the State Bar of California suspended Twitty for various ethical violations, including failing to return unearned fees to his clients and improper contact with an already-represented client. The Court is somewhat dubious of Twitty's credibility in this matter, but it is immaterial to its disposition of the case.

2. In its Response to Petitioner's Status Report, the Government sought leave to tender supplemental arguments concerning Petitioner's motion. Leave to do so is denied as beyond the scope of the supplemental briefing as set forth by Judge Byrne, and the Court will not consider any such supplemental arguments. Regardless, though, the Court afforded both parties an additional opportunity to address Ground 3 of Petitioner's Motion in the most recent set of supplemental briefing.

given by Judge Waters (a busy court calendar and the prosecutor's vacation) were improper. Thus, Nash argues, Twitty's failure to object to the excludability of the 84 days — thus allowing the trial to commence 69 days after required by the Speedy Trial Act — constituted ineffective assistance of counsel.

The Government does not address whether the 84 days were properly excluded. Instead, the Government relies entirely on Twitty's contention that Nash repeatedly told Twitty to delay the trial as long as possible because of Nash's possible cooperation with a separate grand jury investigation. Nash claims he never made such requests to Twitty.

This factual dispute makes it difficult for this Court to determine, without an evidentiary hearing, whether Twitty's representation fell below an objective standard of reasonableness. However, Nash's claim fails for a different reason --because he

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cannot show resulting prejudice, or that the outcome of the case would have been different had Twitty made a speedy trial motion. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." Strickland, 466 U.S. at 697.

Assuming a violation of the Speedy Trial Act occurred, the trial court could have dismissed the case with or without prejudice. ee 18 U.S.C. § 3162(a)(2). If the court had dismissed the case with prejudice, Nash can show resulting prejudice from the underlying Sixth Amendment violation. If the case had been dismissed without prejudice, however, the Government almost assuredly would have re-indicted Nash, and Nash makes no showing that the new trial would have turned out differently. The question therefore becomes whether

the trial court would have dismissed the case with or without prejudice. In dismissing a case because of a violation of the Speedy Trial Act, "[a] district court has broad discretion whether to dismiss with or without prejudice." United States v Jordan, 915 F.2d 563, 566 (9th Cir. 1990) (internal citation omitted). In making this determination, "the court shall consider ... the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution ... on the administration of justice." 18 U.S.C. § 3162(a)(2). The court should also consider whether the defendant was prejudiced by the delay. United States v. Taylor, 487 U.S. 326, 334 (1988). The choice of whether to dismiss with or without prejudice "depends on a careful application of the statutorily enumerated factors to the particular case; there is no presumption in favor of either sanction." United States v. Clymer, 25 F.3d 824, 831 (9th Cir. 1994) (citing Taylor, 487 U.S. at 334).

These factors indicate that the district court would have dismissed the case without prejudice. First, the court must consider the seriousness of the offense, and balance it with the seriousness of the delay. Clymer 25 F.3d at 831 (citations omitted). Because of the nature of Nash's crimes – five counts of bank fraud and ten counts of making false statements – and their resulting eleven-year sentence, these

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were serious enough offenses to warrant dismissing the case without prejudice. See, United States v. Scott, 270 F.3d 30, 58 (1st Cir. 2001) (bank fraud serious offense in Speedy Trial Act analysis). Furthermore, the delay here was, at most, just 69 days.

Regarding the facts and circumstances of the case which led to dismissal, "the court should focus on the culpability of the delay-producing conduct," United States v.

Saltzman, 984 F.2d 1087, 1092 (10th Cir. 1993), and the "sheer length" of the period involved. Clymer 25 F.3d at 831-32. Here, there is no indication that trial was delayed for any improper purpose and the prosecutors contributed to just a portion of the relatively short delay, which also supports a decision to dismiss without prejudice.

Third, Nash makes no showing that his reprosecution would impair the administration of justice, and the Court cannot identify any reason why it would.

Lastly, Nash makes no showing that he was prejudiced by the delay. Taylor, 487 U.S. at 341 (short delay with no harm to trial preparation weighs against dismissing case with prejudice); Clymer, 25 F.3d at 832 (inability to find defense witness and loss of evidence after long delay, loss of ability of prepare for trial and loss ofliberty is prejudicial to defendant). Neither party argues any other factors that the court should have considered in this instance.

Nash has not shown that Twitty's failure to make such a speedy trial motion resulted in prejudice, so his motion to vacate the sentence on this ground is denied.

2. Judge Water's Instruction on Materiality

Materiality is not a required element of 18 United States Code section 1014, but it is an element of section 1344. See Nash, 115 F.3d at 1435-36. While instructing the jury on these two statutes, Judge Waters stated, "False statements of income and assets are material for the purposes of these instructions." Nash argues that the jury might have applied this instruction to both section 1014 and section

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1344, and thus materiality under section 1344 was not left for the jury to decide, in violation of United States v. Gaudin, 515 U.S. 506 (2002).

On direct appeal, the Ninth Circuit reviewed this instruction on mate'iality by Judge Waters and held that, even if the trial court erroneously instructed on materiality, the instruction did not prejudice Nash because "[t]here is no question" that the materiality element was met in the underlying case. Nash, 115 F.3d at 1437. Thus, even if Twitty's representation fell below an objective standard of reasonableness for failing to object to the materiality instruction, Nash cannot show resulting prejudice.

Nash argues that the result would have been different because, had Twitty objected, the Court of Appeals would have reviewed the decision for harmless en-or under Federal Rule of Criminal Procedure 52(a) rather than for plain error under Rule 52(b). Rules 52(a) and 52(b) both address whether an error committed during trial affected "substantial rights," i.e., whether the error was "prejudicial." United States v. Olano, 507 U.S. 725, 734 (1993) (prejudicial error, or one that affects substantial rights, required under Rules 52(a) and 52(b)).

> When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record – a so-called "harmless error" inquiry – to determine whether the error was prejudicial. Rule 52(b) normally requires the same kind of inquiry, with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.

Id. The Court of Appeal's language regarding prejudice – "[t]here is *no question* that the representations [by Nash] on which the bank relied were material for purposes of section 1344" (emphasis added) – confirms that it is immaterial who had the burden of persuasion, Nash, 115 F.3d at 1437, and that it would have made the same

decision whether reviewing the matter under Rule 52(a) or Rule 52(b). Twitty's failure to object to the trial judge's materiality instruction did not result in Prejudice.

Nash has not shown that Twitty's failure to object to the materiality instruction resulted in prejudice, so his motion to vacate the sentence on this ground is denied.

[end of Order pertinent to the issue presented in this Petition]

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III. Conclusion

For the foregoing reasons, the Court DENIES Nash's Motion to Vacate, Set Aside or Correct his Sentence under 28 United States Code section 2255.

IT IS SO ORDERED.

DATED: August 23, 2006

DICKRAN IEVRIZIAN
Dickran Tevrzian, Senior Judge
United States District Court

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